



Appeal Decision

Inquiry held on 27-29 September 2022 and 18-21 April 2023

Site Visit made on 20 April 2023

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20/06/2023

Appeal Ref: APP/Y3615/C/19/3238790

Land at Highlands Farm, Portsmouth Road, Ripley GU23 6EY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr R Hunt against an enforcement notice issued by Guildford Borough Council.
- The enforcement notice was issued on 5 September 2019.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use of the Land from a nil use to the mixed use of the Land for residential purposes, through the stationing of a park home and the use of the Land and buildings for non-agricultural storage, including but not limited to the storage of motor vehicles.

Without planning permission, operational development consisting of the construction of two steel portal-framed buildings labelled A and B on Plan 2 attached to the Notice; the laying of concrete hardstanding hatched in black on Plan 2; the construction of retaining walls cross-hatched in green on Plan 2 attached to this Notice; the construction of breeze block planters shown cross-hatched in red on Plan 2 attached to this Notice and the construction of tracks cross-hatched in black on Plan 2 attached to this Notice.

- The requirements of the notice are:
 - i) Cease using the Land for storage purposes.
 - ii) Remove from the Land all items and paraphernalia brought onto the land for non-agricultural purposes including, but not limited to, motor vehicles.
 - iii) Remove from the Land the two-steel portal framed buildings labelled A and B on Plan 2 attached to this Notice.
 - iv) Remove from the Land the concrete hard surfacing hatched in black and shown on Plan 2 attached to this Notice.
 - v) Remove from the Land the retaining walls located around and to the east of the Building B and shown hatched in green on Plan 2 attached to this Notice.
 - vi) Remove from the Land the breeze-block planters shown hatched in red on Plan 2 attached to this Notice.
 - vii) Remove from the Land the tracks cross-hatched in black on Plan 2 attached to this notice. For the avoidance of doubt, this includes all kerb stones and any road planings that have been laid as a substrate.
 - viii) On completion of Step vii), re-seed with grass seed the area where the tracks referred to in Step vii) was previously located.
 - ix) Remove from the Land the fencing and brick piers highlighted in blue on Plan 1 attached to this Notice.
 - x) Cease using the Land for residential purposes.
 - xi) Remove from the Land the park home brought onto the Land for residential purposes.
 - xii) Remove from the Land the steps leading up to the park home.
 - xiii) Remove from the Land any sewage plant and equipment and any other utilities, plant and equipment brought onto the Land for residential purposes.

- xiv) Remove from the Land the fencing, wall, brick pillars and gates constructed on the Land in association with the unauthorised residential use and highlighted in green on Plan 1 attached to this Notice.
 - xv) Remove from the Land any material laid to create hard surfacing to facilitate the unauthorised residential use, including but not limited to the concrete slab under the park home.
 - xvi) Remove from the Land the timber utilities outbuilding brought onto the land in connection with the residential use of the Land and shown marked with a red square on Plan 2 attached to this Notice.
 - xvii) Remove from the Land any additional residential paraphernalia brought onto the Land in connection with the residential use of the land, including but not limited to the satellite dish.
 - xviii) On completion of steps x) – xvii) above, level and re-seed with grass seed the land which previously formed the park home enclosure, edged in green on Plan 1 attached to this Notice.
- The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.

Summary of Decision: The appeal is allowed, and the enforcement notice is quashed.

Procedural Matters

1. The appeal was initially made on grounds (a), (c), (d) and (g) of section 174(2) of the 1990 Act. However, the fee was not paid in respect of the deemed planning application and thus the appeal on ground (a) lapsed. Moreover, subsequent to the submission of the appeal, appeals on grounds (b) and (f) were made. I have therefore proceeded on the basis the appeal is made on grounds (b), (c), (d), (f) and (g) of section 174(2) of the Act.
2. The Inquiry opened on Tuesday 27 September 2022. However, the Inquiry was adjourned on the third day due to illness. It subsequently resumed on Tuesday 18 April 2023.
3. Before the Inquiry, the LPA requested that its comments made in rebuttal to the appellant's appeal statement of March 2020 were added to the Inquiry Core Document Library. The appellant objected to its addition on the basis that they had been unable to respond to the comments due to a delay in receiving them. Thus, it was said to be procedurally unfair to accept them. However, as I set out at the Inquiry, the appellant did have the opportunity to review the document in advance of the Inquiry and had sufficient opportunity to respond to the LPA's statement at the Inquiry through oral evidence. As such, I take the view that no prejudice arises and accept the submission of the document.
4. All evidence at the Inquiry was given under affirmation.

Application for Costs

5. At the Inquiry an application for costs was made by Mr R Hunt against Guildford Borough Council. This application is the subject of a separate Decision.

The Enforcement Notice

6. I requested submissions at the Inquiry on the wording of the alleged breach of planning control contained in the enforcement notice. In particular, I sought views on whether the phrase, "including but not limited to", is sufficiently precise such that the enforcement notice tells the recipient fairly what they have done wrong.
7. The main parties agreed that the allegation was sufficiently precise and that there was no misunderstanding about the phrase "including but not limited to". On the basis of the parties' submissions at the Inquiry, I am satisfied that the notice is sufficiently precise and unambiguous and that the recipient would have been able to ascertain what it is they are alleged to have done from the four corners of the notice.

Appeal on ground (b)

8. An appeal on ground (b) is made on the basis that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, that those matters have not occurred.
9. There are two limbs to the alleged breach. One the allegation of a material change of use, the second, an allegation of operational development. The appellant does not dispute that the operational development comprising two buildings, concrete hardstanding, retaining walls, planters and tracks has taken place as a matter of fact.
10. In contrast, the appellant does contest the accuracy of the alleged material change of use of the Land. The appellant's case is largely predicated on the basis that they say, the previous use of the Land was not a *nil use*, and at the date the notice was issued, the mixed use the Land was put to also included agriculture.
11. The concept of a mixed use is two or more primary uses taking place within the same planning unit. One use is not incidental to the other. It was held in *East Sussex*¹ that, where there is a mixed use, it is not open to the LPA to decouple elements of it; the use is a single mixed use with all its component activities.
12. In considering whether or what material change of use has taken place, it is first necessary to establish the correct planning unit. Here, both main parties agree that the extent of the Land to which the enforcement notice relates comprises a single planning unit. From all I have heard and read, I see no reason to come to an alternative conclusion.
13. The first matter to address is the question of the previous use. The concept of a *nil use* is one which occurs where the right to revert to the last lawful use has been lost due to a material change to some other use, abandonment or for some other reason. In that scenario there is no base use on which to assess the materiality of the change.
14. Assessing the previous use of the Land in this case largely goes to the appeal on ground (d), where the appellant has given evidence on the historic uses of the Land going back to the 1970s. The LPA's position is that there is no existing lawful use prior to the material change of use alleged in the notice. However,

¹ *R (oao) East Sussex CC v SSCLG* [2009] EWHC 3841 (Admin)

whilst it is preferable for a notice to state the previous use, it was held in *Westminster*² and *Ferris*³ that it is not fatal to the notice if it does not do so. Moreover, the judgement in *Ferris*, made clear that the citation of a previous use which on the evidence was found to be incorrect would also not be fatal to the notice. It therefore seems to me that the question of whether the allegation in the notice correctly refers to the previous use is a moot point, since I could correct the notice to delete the reference to the previous use without rendering the notice invalid. Such a correction would not result in injustice to either party since the appeal on ground (d) does not relate to the alleged material change of use. Likewise, consideration of the previous use of the Land for the question of immunity on ground (d) would be unaffected by such a correction.

15. Turning to the issue of the components of the alleged mixed use. The appellant states that at the date the notice was issued, the Land was also in use for agriculture. At that time, it is said to have comprised the keeping of two bulls for grazing, along with meadow land, the keeping of hay for animal feed and the siting of three field shelters upon the Land.
16. The LPA draws my attention to the appellants statement addendum of February 2020⁴. Therein the appellant states that the buildings and land had not been used for agricultural purposes since the 1980s and that the site as a whole appears to have established a non-agricultural use.
17. However, paragraph 2.4 of that statement makes clear that the ground (d) appeal at the time was specifically relating to the southern group of buildings and that they were used for the storage of non-agricultural items for a continuous period in excess of 10 years. Indeed, the statement goes on to focus solely on these buildings and the yard area around them. There is little suggestion therein that the appellant's reference to the land or entire site was referring to the entirety of the Land subject of the notice. A fair reading of the statement points towards it being focussed on a much narrower area. As a result, I do not accept that the February 2020 statement is an admission on behalf of the appellant that no agricultural use was taking place on the Land to which the notice relates as a whole.
18. The LPA accepts that at the date the notice was issued, two bulls were being kept on the Land as well as a number of bales of hay. Indeed, the LPA first observed cattle on the Land in November 2018. It was clarified at the Inquiry that two bulls were then seen on the Land at every LPA visit up until September 2019 and the issue of the enforcement notice.
19. The LPA also noted field shelters on the Land on several visits prior to the issue of the notice. In addition, at the Inquiry, the LPA accepted that the fields on the Land were laid to grass. The LPA's witness indicated in cross-examination that the Land was in part put to meadow at the time of their visits. However, the LPA indicated in its closing submissions that it did not in fact accept the proposition the Land was laid to meadow. There is therefore some confusion in the LPA's position on that matter. In any event, the LPA accepts that the keeping of bulls for grazing falls within the definition of agriculture in section 336(1) of the 1990 Act. Thus, it is accepted by the LPA that there were

² *Westminster CC v SSE & Aboro* [1983] JPL 602

³ *Ferris v SSE* [1998] JPL 777

⁴ CD5

- agricultural activities being carried out on the Land at the date the notice was issued.
20. Nevertheless, the LPA's position is that the scale of the activities were of such a limited level, that there was no material agricultural use taking place on the Land at the date the notice was issued. Essentially, it is said that the agricultural activities were *de minimis* and did not constitute a primary use as part of the mixed use. The question of whether that is the case or not is a matter of planning judgement, a point on which the main parties agreed at the Inquiry.
 21. Undoubtedly, at around 23 acres, the Land could host more cattle than the two which were grazing in September 2019. Indeed, that was apparent at the site visit where I saw a larger number of cattle on the Land. However, to my mind, the size of the Land is not so large that keeping two cattle on it would be of no material significance. Indeed, that is compounded by the fact that a proportion of the 23 acres was also in use for non-agricultural storage and residential at the time of the notice.
 22. There is nothing before me to suggest that the agricultural use was incidental or ancillary to the residential use of the Land. Likewise, there is no suggestion the agricultural use was incidental or ancillary to the non-agricultural storage use being carried out within the buildings in and around the yard area. Indeed, the LPA drew the distinction within the notice that the storage use was not agricultural.
 23. It thus seems to me that the grazing of two cattle, compounded by the storing of hay and the siting of field shelters, in the context of this site is not of such an immaterial scale as to render it *de minimis*. In contrast, I am led by the evidence to the conclusion that, whilst the use may have been of a lower level than it is currently, at the time the notice was issued there was a primary agricultural use being carried out on the Land as part of a mixed use. On that basis, the alleged breach stated in the notice does not accurately reflect the use taking place at the time it was issued.
 24. The parties agree that the use of the Land for agriculture would be lawful, since agricultural use of Land is exempt from development under section 55 of the 1990 Act. If it is apparent in a material change of use case that a notice does not describe all of the components of a mixed-use taking place on the site, the notice should be corrected if possible, to describe the mixed use properly.
 25. The notice here should therefore be corrected to refer to the material change of use of the Land to a mixed use of residential, non-agricultural storage and agricultural use.
 26. However, it is only open to me to correct the allegation to incorporate the additional component of the mixed use where I am satisfied that there would be no injustice to the LPA or the appellant.
 27. The appellant argues that injustice would occur. They say they have been unable to pursue a ground (a) appeal and a deemed application to seek planning permission for the operational development element of the breach on the basis that the buildings subject of the notice would only be justified for retention in connection with an agricultural use. It is argued, in the absence of

- agriculture as a primary use within the alleged mixed use of the Land, there is no scope to justify the retention of the buildings for agricultural purposes.
28. The LPA says that no prejudice has arisen since it was open to the appellant to seek planning permission for the operational development without specifying the use of the buildings. Moreover, since the agricultural use of Land does not amount to the development, the LPA says it would still have been open to the appellant to pursue the ground (a) for the buildings on the basis that they would be necessary for agriculture.
29. However, it seems to me that such an argument would not be open to the appellant, since the terms of a deemed application under an appeal on ground (a) can only be derived from the terms of the alleged breach, as corrected where the case may be. Therefore, the appellant would be left in a situation whereby they were seeking to justify the retention of the buildings on some notional agricultural use rather than actual use.
30. Furthermore, the appellant's evidence to the Inquiry was clear that the two buildings, hardstanding, retaining walls, tracks and planters were constructed at least in part to facilitate agricultural use of the Land. In the absence of the notice correctly specifying the composite uses of the mixed use, the appellant has been prejudiced by their inability to seek planning permission for the erection of the buildings for agricultural use. Moreover, even setting aside the issue of the operational development of the breach, the appellant has been unable to advance a case on ground (a) in respect of the correct mixed use, which would also be widened by the correction.
31. I note that the appellant previously sought planning permission in March 2019 for the operational development referred to in the breach which was refused in July 2019 and subsequently dismissed on appeal in March 2020⁵. The proposed use of the buildings was for a mix of agriculture and equestrian purposes. The appeal was dismissed partly on the basis that the buildings constituted inappropriate development in the Green Belt. Nonetheless, the question of whether the development amounted to inappropriate development rested on the equestrian element of the proposed use. Indeed, it is noted within that the decision that the main parties agreed that the lawful use of the land was agricultural. Thus, the failure of the notice to specify agriculture within the alleged mixed use in the notice means the appellant has been denied the opportunity to make the case that the buildings are not inappropriate development in the Green Belt if solely used for the agricultural use which I have found was taking place at the time the notice was issued.
32. Additionally, for the same reasons, I consider it is not open to me to find success on the ground (b) appeal in part and delete only the MCU element of the alleged breach and its accompanying requirements, leaving the notice attacking only the operational development.
33. I conclude, therefore, that the matters alleged to constitute a breach of planning control as stated in the notice had not occurred at the date the notice was issued. The appeal on ground (b) therefore succeeds. In light of the success on ground (b), the enforcement notice will be quashed. In those circumstances, the appeals on grounds (c), (d), (f) and (g) do not fall to be considered.

⁵ APP/Y3615/W/19/3238193

Formal Decision

34. The appeal is allowed, and the enforcement notice is quashed.

J Whitfield

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Alan Masters of Counsel

He called:

Paul Helas	Matters of Fact
Peter Herridge	Matters of Fact
Richard Hunt Jnr	Matters of Fact
Aaron Marsh	Matters of Fact
Stephen Marshall	Matters of Fact
Matt Smith	Associate Director, D&M Planning
Frederick Trodd	Matters of Fact

FOR THE LOCAL PLANNING AUTHORITY:

Isabella Tafur of Counsel

She called:

Alison Adams	Planning Enforcement, Guildford BC
Joanna Searle	Planning Enforcement Team Leader, Guildford BC

INTERESTED PERSONS:

Cllr Andrew Burley
Nigel Harmor

DOCUMENTS

- 1 LPA Photographs
- 2 LPA Site Visit Notes
- 3 LPA Opening Submissions
- 4 Inquiry Notification Letter and List
- 5 Site Plan Annotated by Mr Herridge
- 6 Site Plan Annotated by Mr Marshall
- 7 Updated Core Document List
- 8 Appellants Photographs
- 9 Site Plan Annotated by Mr Marsh
- 10 Site Plan Annotated by Mr Hunt Jnr
- 11 LPA Closing Submissions
- 12 Appellant Closing Submissions